

**In the United States District Court
for the District of West Virginia
Bluefield Division**

Center for Individual Freedom, Inc.,

Plaintiff

v.

Natalie E. Tennant, West Virginia Secretary of State, and Timothy D. Boggess, Prosecuting Attorney for Mercer County, as a representative of the class of prosecuting attorneys in the state of West Virginia,

Defendants

West Virginians for Life, Inc., and Zane Lawhorn,

Plaintiffs,

v.

Natalie E. Tennant, in her official capacity as Secretary of State for West Virginia and as a member of the West Virginia State Election Commission; Gary A. Collias, William N. Renzelli, Robert Rupp, and Cindy Smith, in their official capacities as members of the West Virginia State Election Commission; and Timothy D. Boggess, in his official capacity as Prosecuting Attorney for Mercer County, West Virginia, as representative of the class of prosecuting attorneys in West Virginia,

Defendants

Plaintiffs WVFL and Lawhorn's Second Summary Judgment Reply

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Plaintiffs West Virginians for Life, Inc. (“WVFL”) and Zane Lawhorn (“Plaintiffs”) file this reply to Defendants’ response¹ to Plaintiffs’ second summary-judgment motion and brief.²

I. Background

Plaintiffs stand by the background in their summary-judgment motion and brief.

II. Discussion

A. Justiciability

Although Defendants do not contest ripeness, they re-assert mootness contentions. However, Plaintiffs’ claims are not moot, as the Court has held and for the reasons previously explained.³

Defendants also challenge Plaintiffs’ standing yet only as to political-committee status. Defendants say Plaintiffs lack standing, because Defendants have never regulated or threatened to regulate WVFL as a political committee.⁴ This is mistaken. While persons will lack standing when they have only an “imaginary or speculative” fear of enforcement or prosecution, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Younger v. Harris*,

¹ Doc. 216.

² Docs. 209, 209-7 (also numbered by clerk’s office as Doc. 211).

³ Compare Doc. 216 at 3, 12, 13 with Doc. 206 at 3 and Doc. 191.

⁴ Doc. 216 at 20.

401 U.S. 37, 42 (1971)) – such as when they neither (1) have received a threat of enforcement or prosecution, (2) claim that enforcement or prosecution is likely, nor (3) allege the enforcement or prosecution is even remotely possible, *id.* (quoting *Younger*, 401 U.S. at 42) – persons who allege “an actual and well-founded fear” of enforcement or prosecution have standing to file a pre-enforcement action. *Virginia v. American Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988). Plaintiffs do not merely “speculate[]” about the “possibility” that Defendants “could … construe[]” West Virginia law to apply to WVFL. Instead, Plaintiffs reasonably fear it does apply.⁵ While Defendants reject this by citing the Court’s preliminary-injunction order, they have not addressed Plaintiffs’ point that the order is incorrect in this respect.⁶

B. Summary Judgment Standard

Defendants do not contest the summary-judgment standard.⁷

C. First Principles

Defendants assert government’s power to regulate elections. However, this does not trump the principle that freedom of speech is the norm, not the exception, and law regulating political speech must not be vague or overbroad.⁸

⁵ Compare Doc. 216 at 20 (emphasis omitted) with Doc. 209 at 5.

⁶ Compare Doc. 216 at 20 with Doc. 209-7 at 32-36.

⁷ Doc. 209-7 at 7.

D. Vagueness

Defendants are mistaken in rejecting Plaintiffs' vagueness challenges.

- As to the phrase “supporting or opposing” in West Virginia law, Defendants recall that the preliminary-injunction order held the phrase is not vague, yet they do not address Plaintiffs’ submission that this holding is mistaken.⁹
- Defendants are incorrect in saying *Citizens United v. FEC*, 558 U.S. ___, ___, 130 S.Ct. 876, 914-16 (2010), “reaffirmed” the appeal-to-vote test. Instead, *Citizens United* renders it unconstitutionally vague. Defendants disagree by calling the test “clear and objective” and saying *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449[, 470] (2007) (“*WRTL II*”), characterized the test as “objective[,]” but that does not change the fact that *Citizens United*, which follows *WRTL II*, renders the appeal-to-vote test unconstitutionally vague.¹⁰

And there is more. West Virginia’s 2010 and pre-2010 express-advocacy definitions apply the appeal-to-vote test beyond FECA electioneering communications.¹¹ *WRTL II* rejected a contention that the test was vague by noting

⁸ Compare Doc. 216 at 4 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)) with Doc. 209-7 at 7-10.

⁹ Compare Doc. 216 at 14, 16-17 with Doc. 209-7 at 14-16.

¹⁰ Compare Doc. 216 at 6-7 & n.9, 22 with Doc. 209-7 at 16-18.

¹¹ See Doc. 209 at 8.

it applied only to electioneering communications as defined in FECA.¹² Under *WRTL II*, it follows that elsewhere the test *is* unconstitutionally vague. Defendants disagree, and say no court other than *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 281-82 (4th Cir. 2008) (“*NCRL III*”), recognized that the appeal-to-vote test applied only to FECA electioneering communications.¹³ This is also incorrect.¹⁴ But even if Defendants were right, *NCRL III* would still be binding precedent. The *NCRL III* dissent, which Defendants cite,¹⁵ is not binding.

While Defendants ask for a narrowing gloss to save West Virginia’s version of the appeal-to-vote test, no narrowing gloss saves West Virginia law.¹⁶ In any event,

¹² Doc. 209-7 at 16 (citing 551 U.S. at 474 n.7).

¹³ See Doc. 216 at 8, 10 & n.14.

¹⁴ See *New Mexico Youth Organized v. Herrera*, No. CIV 08-1156 JCH/WDS, order at 24-25 (D.N.M. Aug. 3, 2009) (“*NMYO*”) (quoting *WRTL II*, 127 S.Ct. 2652, 2667 (2007)), available at <http://www.nmcourt.fed.us/Drs-Web/view-file?full-path-file-name=%2Fdata%2Fdrs%2Fdm%2Fdocuments%2Fndd%2F2009%2F08%2F03%2F0002481726-0000000000-08cv01156.pdf>, aff’d on other grounds, 611 F.3d 669, 676-79 (10th Cir. 2010); *id.* at 25 (quoting *WRTL II*, 127 S.Ct. at 2667, and citing *NCRL III*, 525 F.3d at 283, and *National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F. Supp.2d 1132, 1150 (D. Utah 2008)); *Broward Coal. of Condos., Homeowners Ass’n & Cnty. Orgs., Inc. v. Browning*, No. 08-445, 2009 WL 1457972 at *5 (N.D. Fla. May 22, 2009) (Doc 209-1) (quoting *NCRL III*, 525 F.3d at 282, and citing *WRTL II*, 127 S.Ct. at 2667); *Broward*, 2008 WL 4791004 at *7 (N.D. Fla. Oct. 29, 2008) (Doc 209-2) (quoting *NCRL III*, 525 F.3d at 282, and citing *WRTL II*, 127 S.Ct. at 2667); *National Right to Work*, 581 F. Supp.2d at 1144 (citing *NCRL III*, 525 F.3d at 282); *id.* at 1150 (citing *NCRL III*, 525 F.3d at 282).

¹⁵ Doc. 216 at 9-10 & n.14.

¹⁶ Compare Doc. 216 at 6 with Doc. 209-7 at 62-63.

the standard for whether a *federal* court may narrow a *state* law is not whether the gloss is “fairly possible” but whether the gloss is “reasonable and readily apparent.”¹⁷

- Defendants do not disagree with the assertion that references to context render their law vague. Instead, they say their law does not regulate speech based on context, yet the pre-2010 law does.¹⁸

E. Overbreadth: In General

Defendants have the burden of proving West Virginia law survives scrutiny.¹⁹ They do not disagree.

F. Overbreadth: The Political Action Committee (“PAC”), Unaffiliated PAC, and Political Committee Definitions

West Virginia’s PAC, unaffiliated PAC, and political-committee definitions, through which West Virginia imposes full-fledged political-committee burdens, fail strict scrutiny. It is the definitions, not the accompanying disclosure requirements, which Plaintiffs challenge here.²⁰ Defendants do not disagree that the definitions

¹⁷ Compare Doc. 216 at 6, 7 n.10 (“fairly possible”) with Doc. 209-7 at 62 (“reasonable and readily apparent”).

¹⁸ Compare Doc. 216 at 8 n.12 with Doc. 209 at 8.

¹⁹ Doc. 209-7 at 19-21.

²⁰ Doc. 209-7 at 21-36.

fail strict scrutiny. Instead, they acknowledge the major-purpose test; they also contest Plaintiffs' standing, which Plaintiffs have previously addressed.²¹

G. Overbreadth: The Express Advocacy and Independent Expenditure Definitions; the Independent Expenditure Reporting and Disclaimer Requirements; the Electioneering Communication Definition; and the Electioneering Communications Reporting and Disclaimer Requirements

Defendants say *Citizens United*, 130 S.Ct. at 914-16, overrules *NCRL III*, 525 F.3d at 281-82,²² yet it does not. As *NCRL III* recognizes, *see id.*, when it comes to spending for political speech by organizations government may *not* regulate as political committees:

- *Buckley v. Valeo* held that government may, subject to further inquiry, regulate only express advocacy as defined in *Buckley*. 424 U.S. 1, 39-51, 74-81 (1976).
- *WRTL II*, which follows *McConnell v. FEC*, 540 U.S. 93 (2003), then added that government may, subject to further inquiry, ban – and, by implication, regulate – electioneering communications as defined in the Federal Election Campaign Act (“FECA”) that pass the appeal-to-vote test.

Citizens United, rather than overruling *NCRL III*, removes the appeal-to-vote test as a constitutional limit on government power. Supreme Court precedent now allows government to regulate *Buckley* express advocacy and FECA electioneering

²¹ Compare Doc. 216 at 20 with *supra* Part II.A.

²² Doc. 216 at 3 n.3, 8, 10-12, 22 (“the faulty reasoning of *Leake*”).

communications.²³ Thus, the express-advocacy test is not “impractical”; it is just not the sole limit on government power.²⁴ If Defendants want to regulate more than what Supreme Court precedent establishes West Virginia has a sufficiently important interest in regulating, *they* must prove their law survives scrutiny.²⁵

Defendants’ further points about West Virginia law are incomplete or incorrect.

²³ Doc. 209-7 at 39-43, 47-49. Defendants’ summary of Plaintiffs’ contention omits the phrase “as defined in FECA.” See Doc. 216 at 21. As an aside:

- The *NCRL III* plaintiff was not a “political action committee”; instead, NCRL is an organization that state law unconstitutionally regulated as a political committee. Compare Doc. 216 at 8 with 525 F.3d at 287-90. In that sense, NCRL is like WVFL. See, e.g., Doc 209 at 5-7.
- Nor are Defendants correct in saying *NCRL III* is “more restrictive” than what the *Citizens United* plaintiff sought. Compare Doc. 216 at 11 with 130 S.Ct. at 914-16. *Citizens United* invited the Court to hold what *WRTL II* had implied: That government may *regulate* FECA electioneering communications only when they pass the appeal-to-vote test. See *Citizens United*, 130 S.Ct. at 914-16.
- The appeal-to-vote test is no longer a constitutional limit on government power, yet that is not because the Supreme Court developed the test “in the context of the now obsolete ban on corporate express[]advocacy.” This is not where the Court developed the test. Compare Doc. 216 at 21 with Doc. 209-7 at 39-43.

²⁴ Compare Doc. 216 at 5 with Doc. 209 at 43.

²⁵ *Supra* Part II.E.

- Although Defendants say they regulate only express advocacy and electioneering communications,²⁶ their regulation of what they call “express advocacy” extends beyond *Buckley* express advocacy and beyond FECA electioneering communications.²⁷ The same is true of their regulation of what they call electioneering communications.²⁸ Calling something “express advocacy” does not make it *Buckley* express advocacy, and calling something an “electioneering communication” does not make it a FECA electioneering communication.
- It is incorrect to suggest *Citizens United* implies government may regulate other speech. No such speech was before the Court.²⁹
- Neither Defendants’ “previous memoranda” nor their spreadsheet³⁰ proves their law survives exacting scrutiny.

²⁶ Doc. 216 at 22.

²⁷ Compare Doc. 216 at 3 & n.3, 22 with Doc. 209 at 39-43, 47-49.

²⁸ Doc. 209-7 at 47-49.

²⁹ Compare Doc. 216 at 12 with 130 S.Ct. at 887-89.

³⁰ Doc. 216 at 12. One cited document addresses mootness, *see* Doc. 194 at 7-8, and another says exacting scrutiny applies but does not explain why Defendants should prevail. *See* Doc. 199 at 11-12. The cited spreadsheet is no more insightful. *See* Doc. 216-1. Another cited document has text discussed above, compare Doc. 176 at 16-19 & n.17 with Doc. 216 at 8-10 & nn.13-14 and *supra* Part II.G, reviews a previous order, *see* Doc. 176 at 20, and quotes the West Virginia legislature’s findings. *See id.* at 21-22. At best for Defendants, the findings appear to say West Virginia political speakers use non-Broadcast speech, *id.* at 21-22 ¶¶ 3, 9, which is “prevalent” and “effective” at election time. *Id.* at 21-22 ¶¶ 3, 10. However, government may not regulate political speech based on its effectiveness, *see WRTL II*, 551 U.S. at 471 (rejecting the FEC’s contention that the effectiveness of speech

West Virginia law is also unconstitutional for the additional reasons Plaintiffs have submitted and which Defendants do not refute.³¹

They do say, however, the 24 and 48 hour reporting requirements are not before the Court. This is so, they say, because Plaintiffs' claims concern only the express-advocacy definition, not the reporting law.³² However, the claims do address reporting of both what West Virginia calls independent expenditures and what West Virginia calls electioneering communications.³³

affected whether government may regulate it); Doc. 209-7 at 10 (noting that *WRTL II* all but forecloses considering factors such as intent, effect, and impact on an election in determining whether speech is regulable (citing 551 U.S. at 467-69 & n.5); *cf. McConnell*, 540 U.S. at 248 (Scalia, J., dissenting) (“this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice”), non-Broadcast speech is *not* as effective as Broadcast speech, *WRTL II*, 551 U.S. at 477 n.9 (citing *McConnell v. FEC*, 251 F.Supp.2d 176, 569-73, 646 (D.D.C. 2003) (Kollar-Kotelly, J.)), and regulating speech based on its prevalence is contrary to the principle that “more speech, not less, is the governing rule.” *Citizens United*, 130 S.Ct. at 911. In any event, much genuine-issue speech is effective and prevalent, yet that does not make it regulable. See Doc. 209-7 at 47 (citing *McConnell*, 540 U.S. at 206 n.88). Further, the timing of speech does not affect whether government may regulate it. See *id.* at 10 (citing *WRTL II*, 551 U.S. at 472-73). Nor does West Virginia’s belief that particular speech may “influence” elections make it regulable. Compare Doc. 176 at 21 ¶¶ 7, 9 with Doc. 209-7 at 26 (quoting, *inter alia*, *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 713 (4th Cir. 1999) (“NCRL I”), cert. denied, 528 U.S. 1153 (2000)).

³¹ Compare Doc. 216 at 23 with Doc. 209-7 at 51-53.

³² Doc. 216 at 22.

³³ See Doc. 209 at 17 & n.38 (citing Doc. 128 ¶¶ 236 (citing, in turn, W. VA. CODE §§ 3-8-2, 3-8-2b (independent-expenditure reporting requirements)), 240 (citing, in turn, W. VA. CODE § 3-8-2 (electioneering-communication reporting requirements))).

H. Overbreadth: The Independent Expenditure Ban

West Virginia's independent-expenditure ban is unconstitutional.³⁴

Defendants do not disagree.

I. facially Unconstitutional

The West Virginia law Plaintiffs challenge is facially unconstitutional.³⁵

Except for a contention based on standing, which Plaintiffs have addressed,³⁶

Defendants do not separately address facial unconstitutionality.

J. Narrowing Glosses, Certification, and Severability

No narrowing gloss, certification, or severance is appropriate in this action.³⁷

Defendants seek only a narrowing gloss, which is incorrect for the reasons

previously explained.³⁸

³⁴ Doc. 209-7 at 57-58.

³⁵ Doc. 209-7 at 58-62.

³⁶ *Supra* Part II.A.

³⁷ Doc. 209-7 at 62-64.

³⁸ *Supra* Part II.D; Doc. 209-7 at 62-63.

III. Conclusion

For the foregoing reasons and for the reasons stated in their summary-judgment brief, Plaintiffs WVFL and Lawhorn request that the Court grant their second summary-judgment motion.

Respectfully submitted,

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October 19, 2010

Certificate of Service

I certify that on October 19, 2010, I electronically filed the foregoing **Plaintiffs WVFL and Lawhorn's Second Summary Reply** with the clerk of court using the CM/ECF system, which will notify the following CM/ECF participants:

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